IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK-APPELLATE DIVISION-THIRD DEPARTMENT

BRIEF OPPOSING MOTION TO DISMISS

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Niagara Mohawk Power Corporation ("Niagara Mohawk", "Appellant" or "the Company") hereby opposes the Motion to Dismiss and Brief in Opposition to Petition For A Writ of Certiorari ("Motion") filed by the Public Service Commission of the State of New York ("the Commission" or "Appellee") in response to Niagara Mohawk's Jurisdictional Statement.

Introduction

The Commission's Motion is based on two erroneous arguments: first, that no substantial federal question has been raised, and second, that the federal questions raised in Niagara Mohawk's Jurisdictional Statement were not properly raised in the courts below. Before responding to the Commission's specific jurisdictional challenges it must

be emphasized that the Motion contains several allegations or statements that are not part of the record in the case and could be misleading.

First, the Commission argues that there "can be no confiscation in this case because Niagara Mohawk had been allowed the full expense for taxes it incurred".[1] The repeated statement that the Company's rates were based on the payment of taxes actually made in the years 1966-1968 is incorrect. There is no evidence of record whatsoever concerning whether any use was made of the Company's actual tax payments for the years 1966-1968 in setting rates of the Company. Therefore, the Commission's original rationale in deciding this case, i.e., that "this money [the tax refunds] was originally paid by customers for an expense that the Company ultimately did not incur" and the Appellate Division's statement that "the money [tax refunds] represents items intended by both parties to have been paid dollar for dollar by consumers"[2] have absolutely no foundation in the record.

Second, the Commission implies that the Company has earned more than a reasonable return as a result of the tax refunds and that its customers have been overcharged. For example, the Commission states that it seeks "to protect the ratepayers from bearing the burden of the overpayment" and that inclusion of the refunds in rate base would provide the Company "with more money than was required to earn a reasonable rate of return."[3] Once again, there is no evidence of record to support these conclusory allegations that the Company's customers have been subjected to overpayments or that the Company, by being permitted to earn a return on the tax refunds, has or will earn more than

1. Motion at page 6.
2. See Appellant's Jurisdictional Statement at p. 9a.
3. Motion at page 6.

a reasonable rate of return. The fact is that the Company has not achieved the return allowed by the Commission during any one of the past ten years.

The Substantial Federal Questions Were Properly and Timely Raised in the Courts Below

This action was commenced by the filing of a petition in the Supreme Court of the State of New York, Albany County, on March 14, 1977. The petition specifically alleged that the Commission's orders were "arbitrary, unsupported by substantial evidence, confiscatory, and contrary to the legal principle that future rates may not be determined on the basis of alleged past excesses." The basis of the Company's challenge was expanded upon in the memorandum of law submitted simultaneously with the petition. In its memorandum the Company expressly raised the constitutional question as follows: "Was the Commission's action . . . confiscatory under the federal and New York State Constitutions?"[4] Upon transfer of the action from the Supreme Court, Albany County, to the Appellate Division, the Company submitted a brief which raised the constitutional question in the identical manner as it was raised in the Company's memorandum submitted to the Supreme Court, Albany County.[5]

The Company's phrasing of the issue, "Was the Commission's action . . . confiscatory under the federal and New York State Constitutions" clearly meets the standard of particularity with which a federal question must be raised in order to sustain this Court's jurisdiction as set forth in *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928):

> There are various ways in which the validity of a state statute may be drawn in question on the ground

4. Memorandum of Law for Appellant at page 2.
5. Brief for Appellant at page 2.

> that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

See also *Street* v. *New York*, 394 U.S. 576, 584 (1969). The clear intendment standard enunciated in *New York ex rel. Bryant* v. *Zimmerman, supra*, formed the basis for this Court's decision in *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization*, 347 U.S. 590 (1954), where the appellant had erroneously invoked the Commerce Clause of the U.S. Constitution instead of the Due Process Clause of the Fourteenth Amendment. Despite naming the wrong constitutional clause in support of its position, the appellant's case received plenary consideration. This Court held:

> However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. *Id.* at 598-599.

The Company's explicit use of the term "confiscatory under the federal . . . Constitution" clearly served to raise the constitutional issue now before this Court.

The Commission further contends that the federal questions involved are not substantial. In support of this assertion the Commission cites several cases where refunds to customers were allowed under the Natural Gas Act, 15 U.S.C. § 717. These cases are inapposite: they concerned a

different agency, a different statute, completely different circumstances and did not involve the constitutional issue of confiscatory ratemaking presented in the instant case. In the instant case there is no question as to whether a refund to consumers is appropriate or permissible; the Appellate Division has already considered and rejected the Commission's attempt to order the flow through to customers of the same tax refunds at issue here. *Niagara Mohawk Power Corp.* v. *Public Service Commission*, 54 App. Div.2d 255, 388 N.Y.S.2d 157 (3rd. Dept. 1976). The issue presently raised by the Company is one of confiscation; whether the Commission can isolate a single item of the Company's property and deny the Company *any* return on such property.

In addition to citing these various FPC cases the Commission attempts to distinguish *Board of Pub. Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23 (1926), on the ground that the Commission, unlike the Board in that case, is here not attempting to use a past excess in earnings to reduce future rates. The fallacy of this distinction is obvious. If the Commission is not contending that the Company collected too much from customers in the past because an excess tax allowance had allegedly been used in setting the Company's rates, it must be concluded that the Commission's isolation of tax refunds for special treatment had no rational basis and was arbitrary. The fact that the Commission appears to distinguish between excess earnings and a single expense that was excessive highlights the broad conceptual difficulty underlying the Commission's approach. In short, the Commission is conceding that a utility may not be penalized in fixing rates for the future because its prior rates produced excessive earnings, *Board of Pub. Utility Commissioners*, v. *N.Y. Tel. Co., supra*, but, on the other hand, the Commission contends that a utility

may have its future rates reduced (by reduction in rate base here) if a single expense allegedly used in setting prior rates is ultimately viewed to have been too high. The suggestion that a single past expense allowance may be characterized as excessive and treated in isolation as the basis for a reduction in future rates, while earnings representing the net of all expenses and revenues may not, runs directly counter to the basic principles of ratemaking.

The Commission also argues that the principle enunciated in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), is neither applicable to state courts nor grounded in due process considerations. The *Chenery* rule has been expressly accepted by the New York State Court of Appeals. *Matter of Seitelman* v. *Lavine*, 36 N.Y. 2d 165, 170 (1975); *Matter of Barry* v. *O'Connell*, 303 N.Y. 46, 51 (1951). The judicial responsibility for effective and timely review of administrative abuse requires an agency to "disclose the basis of its order," *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941), and further requires that the order "cannot be upheld unless the grounds upon which the agency acted . . . were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943); See also *FPC* v. *United Gas Pipeline Co.*, 393 U.S. 71, 72 (1968). That the agency must state the reasons for its determination and that the judiciary must sustain the determination, if at all, solely on that basis is inherent in and inextricably intertwined with the procedural due process guarantees of the Fourteenth Amendment. See *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-68 (1962); *Northern Pacific RR Co.* v. *Dept. of Public Works*, 268 U.S. 39, 44-45 (1925); *Cf. Saunders* v. *Shaw*, 244 U.S. 317 (1917).

Conclusion

For the reasons stated above and in its Jurisdictional Statement the Appellant requests that the Court give this matter plenary consideration.

Respectfully submitted,

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